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IN THE

Supreme Court of the United States

October Term, 1963
No. 759

GEORGE THEODORE MUNTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

On July 23, 1963, the California District Court of Appeal, Second Appellate District, Division Three, rendered its opinion unanimously affirming petitioner's conviction in the Superior Court of Los Angeles County of one count of sodomy and one count of oral copulation, and reversing petitioner's conviction on one count of attempted sodomy. The opinion is attached to the petition for writ of certiorari as Appendix A, and is reported as *People v. Munton*, 218 A. C. A. 358, 32 Cal. Rptr. 508. The California Supreme Court denied a hearing in the case September 18, 1963. None of the justices voted in favor of a hearing. (60 A. C. No. 10, Minutes, p. 2.)

Jurisdictional Statement.

The jurisdictional ground is set forth in the Petition (p. 2), *i.e.*, 28 U. S. C. § 1257(3).

Questions Presented.

The questions presented by petitioner are, essentially, as follows:

1. Whether or not Section 288a of the Penal Code (which makes oral copulation a crime), is unconstitutional for vagueness.

2. Whether or not the evidence is sufficient to support the conviction.

3. Whether or not the representation of petitioner by private counsel at his trial was so inadequate to constitute a violation of the due process clause of the Fourteenth Amendment, because of

a. The subsequent disbarment of the trial counsel, for offenses unrelated to petitioner's trial.

b. The alleged mental incompetence of the trial counsel;

c. The actual conduct of the trial by counsel.

Statement of the Case.

For a factual statement of the case, respondent (hereinafter referred to as California) incorporates by reference the opinion of the District Court of Appeal in this case, which is found as Appendix A to the Petition.

California wishes to correct two errors in Petitioner's Statement of Facts. The first of these occurs in the following sentence:

> "Wallace admitted [1] he was just under 17 years of age, [2] he was from a broken home, [3] he had stolen, [4] and lied, [5] he had been arrested for burglarising at least three homes, [6] for drinking, [7] and was a homosexual. (C. T. 32.)". (Petition, pp. 4-5, numbers added.)

California submits that of the seven separate statements contained in the above sentence, support can be found in the record for only two of them. California agrees that Wallace admitted the age as listed above [1], and that he had lied [4]. The reference cited by petitioner for the other five statements, however, "[C.T. 32]" does not support any of them. It is possible that petitioner intended to cite to The Court as this reference page 42 of the Clerk's Transcript, which does appear to have some support for the statements. That page does not contain admissions by Wallace, but rather is attached to the affidavit of petitioner that was submitted in support of his motion for a new trial. We quote petitioner's own description of this statement:

> "Further, attached is Exhibit A, by reference made a part hereof, purporting to be an arrest record of William Wallace, which record was compiled by a private investigation agency whose services this affiant employed for that purpose. It does not meet the formal requirements of an affidavit

or certified copy, but nonetheless might be of some assistance and information to the Court and all parties concerned, with regards to the credibility of said William Wallace." [Clk. Tr. p. 41.]

The other correction in Petitioner's Statement of Facts which California wishes to make is the following sentence:

"However, this [disbarment of petitioner's trial counsel] did not occur before the opinion of the District Court of Appeal was handed down in this case." (Petition, p. 6.)

The opinion of the California Supreme Court [*Hyland v. State Bar*], 59 Cal. 2d 765, 31 Cal. Rptr. 329, ordering petitioner's trial counsel disbarred (Petition, Appendix B) was filed on June 13, 1963; and was effective on July 12, 1963. The opinion of the District Court of Appeal affirming petitioner's conviction [*People v. Munton*, 218 A. C. A. 558, 32 Cal. Rptr. 508; Petition, Appendix A] was filed on July 23, 1963 and was effective on August 22, 1963.

Thus the disbarment *did* occur before the opinion which affirmed petitioner's conviction.

ARGUMENT.

I.

The Question Presented as to the Alleged Unconstitutionality of the California Oral Copulation Statute for Vagueness Should Not Be Reviewed by This Court.

A. The Contention as to Alleged Unconstitutionality for Vagueness Was Not Presented to Any State Court, and Is Raised for the First Time in the Petition.

One of the questions presented by the Petition should not be considered by This Court, since it has never been presented to the state courts, and has been raised for the first time in the Petition for Writ of Certiorari. This question presented is:

> "Whether Section 288(a) of the Penal Code of the State of California, inherently and as construed and applied in this case, is unconstitutional in that words therein are not defined by statute and are too vague, indefinite and uncertain to constitute penal legislation." (Petition, pp. 6-7.)

Most of the argument presented by Petitioner on pages 7-9 of the Petition is in support of this question.

This Court has often ruled that it will not consider a contention which is raised for the first time in the Supreme Court of the United States, and which has not been presented to the State Courts.

Nelson v. County of Los Angeles, 362 U. S. 1, 9;

Adler v. Board of Education, 342 U. S. 485, 496.

The opinion of the District Court of Appeal (Petition, Appendix A), is silent on this contention. Neither the Clerk's nor the Reporter's transcript reveal any refer-

ence in the trial court to an attack on the constitutionality of Section 288(a) of the California Penal Code on the ground it was vague.

Petitioner has included in the record the petition for hearing filed in the California Supreme Court. No reference was made in that petition to this contention.

Petitioner filed an opening brief with the District Court of Appeal, did not file a reply brief with the District Court of Appeal, did not argue the case orally in the District Court of Appeal, and did not file a petition for rehearing in the District Court of Appeal. California is filing with This Court by separate letter a copy of petitioner's opening brief in the District Court of Appeal. An examination of it will show that the vagueness contention was not presented to the District Court of Appeal in that brief.

B. The Authority Cited by Petitioner for His Vagueness Contention Is No Longer Good Law.

Most of Petitioner's argument (that the California oral copulation statute is unconstitutional for vagueness) is based on a long quotation from a 1941 opinion of the California District Court of Appeal: *People v. Angier*, 44 Cal. App. 2d 417, 418-19; 112 P. 2d 659, 660. (Quoted at pp. 7-9 of Petition.) More recently, the same court that authored the *Angier* opinion made this comment about the passage quoted by Petitioner.

> ". . . [The defendant] seeks refuge behind People v. Angier, (citation omitted) . . . [in that case,] this court was impressed that the mouth of the accused could not have touched the bodies of the children. . . . On reaching that conclusion we were led into a discussion of the

significance of the word "copulate." While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the use of the word in section 288a "signifies a legislative intent that an offender of the statute is guilty only when he has committed the repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court. A person is guilty of violating the statute when he has placed his mouth upon the genital organ of another. . . . The Angier decision is not pertinent unless the factual situation under judicial consideration is in all essential details identical with those there adjudicated."

People v. Harris, 108 Cal. App. 2d 84, 88; 238 P. 2d 158, 160 (1951).

II.

Certiorari Should Not Be Granted to Review the Adequacy of Petitioner's Trial Counsel, Since the Record Is Plain That No Substantial Federal Question Is Presented.

The other main question presented by Petitioner (aside from the sufficiency of the evidence, which obviously does not present any *federal* question), is the contention that the due process clause of the Fourteenth Amendment of the United States Constitution has been violated, because of the inadequacy of petitioner's trial counsel. This contention may be separated into three parts:

A. Trial counsel was inadequate because he has been subsequently disbarred.

B. Trial Counsel was inadequate because he was mentally incompetent.

C. Trial Counsel's inadequacy is manifest from an examination of the Record.

California contends that none of these contentions afford a *substantial* federal question, and their unsoundness can be demonstrated from a brief look at the record.

By way of clarification, petitioner has been represented at all stages of this litigation by counsel. Moreover, petitioner has been represented at all stages by *counsel of his own choice*; at no stage has he utilized court appointed counsel.

Petitioner's present counsel is his third during this litigation. His first private counsel was W. J. Hyland. Mr. Hyland was counsel before and during the trial, and presented the first motion for new trial. Then petitioner obtained the services of his second private counsel, Mrs. Gladys T. Root. Mrs. Root represented petitioner (a) on the second and third motions for new trial at the trial level; (b) filed a brief in the District Court of Appeal; and (c) filed a Petition for Hearing in the State Supreme Court. Petitioner's present counsel, Morris Lavine Esq., has prepared the Petition for Writ of Certiorari.

A. The Subsequent Disbarment of Trial Counsel Does Not Constitute a Substantial Federal Question Regarding Petitioner's Conviction.

It is true that W. J. Hyland, who was petitioner's counsel during the trial of this litigation, has since been disbarred by the California Supreme Court. However we urge that the sequence of events be kept clear. Petitioner's trial in the Superior Court occurred during the month of April, 1961. Mr. Hyland's first motion for a new trial was made in July, 1961. [Clk. Tr. p. 35; Rep. Tr. pp. 257-294.]

Mr. Hyland's disbarment occurred on July 12, 1963, as a result of an opinion of the California Supreme Court which was rendered on June 13, 1963. The opinion is attached to the Petition as Exhibit B. An examination of it shows that there is no reference in it to Mr. Hyland's representation of petitioner in his criminal trial more than two years before.

Moreover, this contention could have been raised by petitioner to both the California District Court of Appeal and to the California Supreme Court. It was in fact raised to neither Court.

The opinion of the District Court of Appeal (that affirmed petitioner's conviction) was filed on July 23, 1963, which is 40 days *after* the State Supreme Court issued its opinion (on June 13, 1963) disbarring Mr. Hyland. Petitioner thus could have, but did not, filed a petition for rehearing with the District Court of Appeal and asserted the disbarment of his trial counsel. (No petition for rehearing was filed with the District Court of Appeal on any ground.)

Although petitioner *did* file a petition for Hearing with the State Supreme Court, on August 28, 1963, no mention was made in it of the disbarment of petitioner's trial counsel.

B. The Contention That Trial Counsel Was Inadequate Because He Was Mentally Incompetent Should Not Be Reviewed.

This contention is being raised for the first time by Petitioner in his Petition. It has not been presented to either the trial or appellate courts in California. The District Court of Appeal opinion, and the Petition for Hearing in the Supreme Court are silent on this point. The only reference to it in the record is a statement in

the opinion of the State Supreme Court disbarring petitioner's trial counsel, that Hyland made the contention in the state bar proceeding that he was mentally incompetent to manage his defense there. [Ex. B. to Petition, pp. 13-15.] Indeed, that opinion states that Mr. Hyland asserted that he recovered completely in December, 1960, which is prior to petitioner's trial in April and July, 1961.

California submits that since there is no authority to support the allegation that petitioner's trial counsel *was* mentally incompetent, and since the point could have been raised in the state courts, and was not, it should not be considered here.

C. An Examination of the Record Shows That Petitioner's Trial Counsel Was Not Inadequate.

Finally, petitioner contends that an examination of the record of the trial will show the inadequacy of the defense of petitioner put forth by his trial counsel. The Petition for Hearing filed with the State Supreme Court contains numerous allegations and examples to support this contention. To answer these, California is filing, by separate letter, a copy of its answer to the Petition for Hearing that was filed with the California Supreme Court, and that resulted in the denial of the Petition for Hearing by that Court.

We also wish to incorporate by reference the portion of the opinion of the District Court of Appeal, that considered and rejected this contention. This can be found at pages 3-5 of Appendix A to the Petition, and in *People v. Munitor*, 218 A. C. A. 558, 561-62, 32 Cal. Rptr. 508, 510. That Court said:

> "The contention, first to be considered, that defendant was inadequately represented by counsel

and thus deprived of a fair trial, requires a consideration of the showing made by defendant upon his motion for a new trial. Sixteen affidavits were filed in support of the motion. Among them were affidavits by Wallace and Bailey repudiating the testimony they had given at the trial. Upon the hearing of the motion Wallace testified that he had believed it was necessary for him to deny participation in the unlawful acts in order to enlist in the armed services, and he reaffirmed his former testimony. There was no showing that the matters to which the other affidavits related were newly discovered and for this reason alone, they could not have furnished a ground for granting the motion. (Pen. Code, §1181.)

"The affidavits were filed in support of defendant's contention that he had been deprived of due process in that he had not been adequately represented at the trial. There was a showing by affidavit that defendant's attorney was informed before the trial of the testimony that would have been given by the affiants and that he failed to call several of them as witnesses and failed to elicit in his examination of the others all that they knew that would have been helpful to defendant. The affiants were in the main employees of the defendant and their statements were designed to contradict the testimony of Wallace and Bailey in several particulars. Both Wallace and Bailey had testified that defendant induced them to drink considerable quantities of liquor and that he had caused them to disrobe and put on only trunks and that they remained in his office for consider-

able periods of time. The affidavits were generally to the effect that the affiants had never known defendant to use liquor or have it in his office, had never known him to have his office door locked and had never known Wallace to go to defendant's office and remain for more than a very few minutes. Such negative testimony could have made little impression upon the jury. One of the affiants would have testified to facts indicating that Wallace had upon other occasions indulged in unlawful sexual activities with other persons. It is now urged that although defendant's attorney was informed as to the testimony these persons would give he was grossly incompetent and negligent in not calling all of them as witnesses and in not developing the testimony of those who were called in greater detail. The contention that defendant was deprived of a fair trial through the incompetence of his attorney merits no extended discussion. Six of the persons who made affidavits had testified in the trial on defendant's behalf; they testified to the substance of the matters stated in their affidavits. The People's witnesses were vigorously and adequately cross-examined; such defense as defendant had was adequately presented. The showing made by defendant was manifestly inadequate to furnish support for his claim that he was denied his right to a fair trial."

Conclusion.

Respondent submits that an examination of the record, in light of the District Court of Appeal's opinion, discloses (1) the absence of any substantial federal question, that was (2) presented to the state courts at a timely stage of the proceedings for their review. It is therefore requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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